Supreme Court, U. S.
FILED
JUN 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1975
No. 75-1553

UNITED STATES POWER SQUADRONS ET AL.

Appellants

v.

MARILYN C. HINDEN ET AL.

Appellees

On Appeal From The Superior Court, Appellate Division of the State of New Jersey

BRIEF IN OPPOSITION TO MOTION TO DISMISS

DONALD K. BARNES

26 Palm Club
Pompano Beach,
Florida 33062

Attorney for Appellants

Quality Print Shop 112 S.W. First Terrace Pompano Beach, Fla. (305) 942-1592

IN THE

Supreme Court of the United States

October Term 1975
No. 75-1553

UNITED STATES POWER SQUADRONS ET AL.

Appellants

v.

MARILYN C. HINDEN ET AL.

Appellees

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellees' "Question Presented"

(1) Appellees' rewording of the first Question Presented in the Jurisdictional Statement is extremely clever, but we suggest it may be further improved by substituting "admissions to" for "the membership practices of", thus eliminating the last vestige of resemblance to the issue in this case. The statute itself does *not* prohibit discrimination in "membership practices," and we have raised no question as to the constitutionality of the statute as written, having had no occasion to do so. We assume it is constitutional. "Places" do not have members; organizations do. The determination below that Appel-

lants' organizations are "places" which may not "discriminate" in their membership policies is conclusive as a construction of the state statute–but it is that *application* of the statute to Appellants, not the statute itself, which raises the constitutional issue as set forth in the Jurisdictional Statement.

A "place" has no rights or freedoms of association; but voluntary, non-profit membership organizations do, and their rights are not constitutionally weakened by labelling them "places of public accommodation" within the meaning of a state enactment. Those rights cannot be eliminated on motion by so restating the question as to assume them gone.

(2) Appellees do not at this point notice at all the second and novel question, although it comes up in their Argument.

Appellees' "Counter Statement of the Case"

To the extent that the Counter Statement adds anything to our Statement of the Case, it consists largely of quotations out of context which are prejudicial and, whatever bearing they had on the Hearing Examiner's "findings", have no relevance to the constitutional questions presented here. There are several inaccuracies, and omissions which result in inaccuracies. It attempts, for instance, to make it appear that the former honorary "government members" had something to do with running the Squadrons, that "extensive advertising" related to other than the public charity, that Mrs. Hinden was not told she could attend the educational conference, that not all advanced courses

were available to women, etc. The attempt to prejudice the case by references to association with government officials and cooperation with government programs is completely irrelevant here, even if it would have any relevance in a state-action case. *All* citizens are invited by statute and proclamation to participate in Cooperative Charting and National Safe Boating Week; and such patriotic endeavors afford no excuse for attacking Palisades or the Squadrons.

As noted in the Jurisdictional Statement, we recognize that the "findings" of the Hearing Examiner, insofar as they pertain to facts, are conclusive; and also that the interpretation of the New Jersey statute by the New Jersey court is conclusive. There is no issue on that point. But what organizations are entitled to First Amendment protection is for the determination of this Court whose jurisdiction cannot be precluded by a Hearing Examiner's conclusion even if affirmed by a local court.

Appellees' "Argument"

Of the cases which Appellees cite for the proposition that *membership* may be dictated all, except *NOW v. Little League* 127 NJ Super 522, 318 A 2d 33, had to do with physical facilities, and the "memberships" in issue were rights to use those facilities. There is no such problem in this case. In *Little League* what was claimed for the girls was a right to participate in the public charity, not to run the outfit. The Squadrons have long welcomed women (including Mrs. Hinden) into their

public charity and thus have been in full compliance with *Little League.*

The contention that any organization which conducts a public charity necessarily exposes its membership to the public is absurd. If that were so, there could be no Moose, no Kappa Kappa Gamma, no Society of Jesus, etc. The repeated characterization of a "finding" of "a place of public accommodation" as "factual" is, of course, wrong. What is or is not "a place of public accommodation" is a pure question of law, not fact, and as to constitutional law a question for this Court.

At page 13 of their brief, Appellees finally take note of the second question: the right of an organization to become a private club (if it was not already) and thus escape the bureaucratic clutches. *Appellees concede that there is such a right:* "This is not to say . . . that . . . it could not thereby become a private organization." But that is not what the Director of the Division on Civil Rights said. When approached on that subject he arrogantly refused to listen and specifically decreed that Palisades could *not* change except to abandon all subjective considerations. (Item 7, p.23a, Jurisdictional Statement.)

Appellees statement at the top of p.13: "Finally, USPS's desire to change some of its rules regarding membership procedures so as to "become" a private club is simply a clear effort to evade the Law Against Discrimination through subterfuge." is patently untrue

and a gross insult, which impugns the good faith not of USPS or Palisades but of the Appellees. As Appellees well know, the effort was to eliminate all those things, even the clearly irrelevant ones, (such as the honorary memberships for selected government officials) which the Hearing Examiner said made membership in Palisades "a place of public accommodation" – a sincere attempt to *comply* with the law. It was hoped that the public charity could be continued, but because of the truculence of the Division on Civil Rights that has had to be suspended throughout New Jersey and will be permanently cancelled unless this Court grants relief. (Appellants cannot afford repeated litigation.) While this is injurious to Palisades and the other Squadrons in New Jersey, the heavy losers are the members of the public, including women, who are thereby deprived of desired free instruction.

The statement at the top of p.14 misrepresents the effect and purpose of the Division's order which undertakes to prohibit *any* selectivity as to either men or women, which is far from continuing what had been the practice as to men. It is as if a motorist apprehended for driving 60 mph were fined for that transgression, notwithstanding discovery that his speedometer was erratic and recorded only 55 mph, and then ordered to continue use of that speedometer. Appellees would say that if he sought permission to install a new and accurate speedometer to avoid future penalties that would be "simply a clear effort to evade the law through subterfuge".

The transparent purpose of that part of the Order is not, as asserted, to prevent evasion but to make sure that the Division can continue its surveillance–typical power grabbing. This, of course, should have been stopped by the New Jersey court. Since it was not, the word from this Court is needed, not only to give relief to these Appellants from the trampling on their constitutional rights, and to the other 400 Squadrons and their 80,000 members throughout the country from the precedential threat, but to establish on the highest authority that any private organization which has carelessly allowed itself to be characterized as "public" has a choice: *either* accept all the public *or* remove the "public" characteristics.

Appellees' "Conclusion"

We can agree with Appellees that in *NAACP v. Alabama* 357 US 488 and *Gibson v. Florida Legislative Investigating Committee* 372 US 539 what this Court did was to prohibit state action which *might* have "repressive effect" on NAACP. What we want the Court to do now is to prohibit state action which *does* have oppressive effect on Palisades and USPS and as precedent endangers other worthy organizations. That is a very substantial federal question, particularly in its novel aspect of the right of an erring private organization to correct its error and be private rather than going public.

* * * *

I have received no notice of appearance on behalf of Appellees with respect to the Petition for Certiorari, No. 75-1607, filed herein by William W. Farrar, Esq., on behalf of Lackawanna, Northern New Jersey and Watchung Power Squadrons. That Petition sets forth a claim of outrageous denial of due process in issueing an order purporting to bind them without their having been complained against, served or heard. That the damage to the Petitioneers is present and actual, and not merely future and speculative, is established by the fact that they have suspended, pending outcome of this litigation, their public charity, the Boating course, because they cannot afford the litigation costs of further harrassment. Such costs, to the Squadrons involved in litigation in New Jersey and New York, and to USPS, already exceed $200,000, a terrible burden for a private, non-profit membership organization supported entirely by the voluntary dues of its members.

Respectfully submitted,

DONALD K. BARNES
Attorney for Appellants

26 Palm Club
Pompano Beach,
Florida 33062

June 4, 1976